16 Am. Jur. 2d Constitutional Law § 49

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III. Operation and Effect of Constitutions and Amendments

C. Effect of Constitutions and Amendments on Existing Laws

§ 49. Effect of constitutions and amendments thereto on existing constitutional provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 633

A new constitution only alters in some respects the fundamental laws of a state,[1] and where constitutional provisions are reenacted in the same words, it is a reasonable presumption that the purpose was not to change the law in such particulars but to continue it in uninterrupted operation.[2] The same rule of continuity applies to amendments to the constitution,[3] as an amendment is equal in dignity to an original provision of the constitution,[4] and when an amendment has been duly made, it becomes as much a part of the constitution as any other part thereof.[5]

In some states, amendments to the state's constitution do not preserve all preexisting provisions of the amended portion of the constitution, thereby forever maintaining all prior delegations of state authority that are curtailed by the amendments themselves;[6] instead, the very purpose and effect of an amendment is to amend the relevant portion of the constitution, effectively repealing and voiding any prior version

of the particular section so amended.[7] In general, however, constitutional amendments, if possible, should be harmonized with other provisions of the constitution[8] and effect given to the whole instrument and to every section and clause wherever possible.[9] Therefore, an amendment to a state constitution that does not include language indicating an intent, express or implied, to repeal a constitutional provision merely supersedes law existing prior to its enactment and modifies the constitutional provision.[10] However, where a new amendment is irreconcilably in conflict with a part of the constitution adopted earlier, the new amendment prevails and supersedes it.[11] Thus, a newer constitutional provision impliedly supersedes the older when the two are irreconcilably repugnant, such that both cannot stand.[12] The latest expression of the will of the people prevails over previously enacted conflicting provisions.[13] This may be the result even where a constitutional amendment is not self-executing.[14]

Footnotes

1 State ex rel. Goodman v. Redding, 87 Ohio St. 388, 101 N.E. 275 (1913).

2 Kingsbury v. Nye, 9 Cal. App. 574, 99 P. 985 (3d Dist. 1908).

3 Ex parte Cole, 12 Cal. App. 290, 107 P. 581 (3d Dist. 1909).

4 Ganson v. Heuck, 45 Ohio App. 246, 15 Ohio L. Abs. 274, 187 N.E. 27 (1st Dist. Hamilton County 1933).

5 Sherman v. Atlanta Independent School System, 293 Ga. 268, 744 S.E.2d 26, 294 Ed. Law Rep. 368 (2013).

6 Baldwin Union Free School Dist. v. County of Nassau, 22 N.Y.3d 606, 986 N.Y.S.2d 1, 9 N.E.3d 351 (2014).

7 Baldwin Union Free School Dist. v. County of Nassau, 22 N.Y.3d 606, 986 N.Y.S.2d 1, 9 N.E.3d 351 (2014).

8 § 67.

9 State ex rel. Boards of Educ. of the Counties of Upshur, et al. v. Chafin, 180 W. Va. 219, 376 S.E.2d 113, 51 Ed. Law Rep. 637 (1988); Matter of Johnson, 568 P.2d 855 (Wyo. 1977).

[10] Fent v. Henry, 2011 OK 10, 257 P.3d 984 (Okla. 2011), as corrected, (Feb. 15, 2011).

[11] Cunningham v. Exon, 207 Neb. 513, 300 N.W.2d 6 (1980); Beehive Medical Electronics, Inc. v. Industrial Com'n, 583 P.2d 53 (Utah 1978); State ex rel. Boards of Educ. of the Counties of Upshur, et al. v. Chafin, 180 W. Va. 219, 376 S.E.2d 113, 51 Ed. Law Rep. 637 (1988).

[12] Ramsey v. City of North Las Vegas, 133 Nev. 96, 392 P.3d 614 (2017).

[13] Voice of Ex-Offender v. State, 249 So. 3d 857 (La. Ct. App. 1st Cir. 2018), writ denied, 255 So. 3d 575 (La. 2018).

[14] Page v. Welfare Com'r, 170 Conn. 258, 365 A.2d 1118 (1976).
As to determining whether a constitutional amendment is self-executing, see §§ 101 to 107.

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III. Operation and Effect of Constitutions and Amendments

C. Effect of Constitutions and Amendments on Existing Laws

§ 50. Effect of constitutions and amendments thereto on existing constitutional provisions—Prospective or retrospective effect

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 630, 633

A state constitutional amendment may be applied retrospectively if the terms of the amendment make it clear that retrospective application was intended.[1] Thus, the general rule is that prospective effect alone is given to provisions of state constitutions,[2] unless a contrary intention is clearly expressed.[3] Accordingly, constitutional amendments generally are presumed to operate prospectively.[4] In fact, constitutional amendments apply only prospectively in all but the most extraordinary circumstances.[5] Thus, unless a later constitutional amendment expressly modifies an existing constitutional provision, the old and the new must both be given effect; both should operate as written, unless the clear intent of the later provision would thereby be defeated.[6] As a means of avoiding conflict, a recent, specific constitutional provision is deemed to carve out an exception to and thereby limit an older, general provision.[7] Indeed, retroactive application of laws is highly disfavored, and therefore, unless the terms or

language of an amendment clearly make the amendment retrospective in operation, it is presumed that a constitutional amendment will be given only prospective application.[8] This is so, even though the amendment essentially reenacts a statute previously declared unconstitutional.[9] Overcoming the presumption requires either an express retroactivity provision in the actual language of the amendment or extrinsic sources that leave no doubt that such was the voters' manifest intent.[10]

Observation:

The question of whether a constitutional right is retroactive is distinct from the question of whether an individual is entitled to a remedy from any constitutional violation.[11]

The ultimate determinative factor is the intent of the framers[12] which must be evident beyond reasonable question in the case of claimed retrospective operation.[13] Constitutional amendments may operate retroactively when it is apparent that such was the intention, provided no impairment of vested rights results from the retroactive application of the amendment.[14]

To determine whether a constitutional amendment is intended to apply retroactively, appellate courts look to the language of the amendment, its legislative history, its purpose and the circumstances of its enactment.[15] A constitutional provision will not be held to operate prospectively only, where to do so would conflict with the clear language of the provision.[16]

Footnotes

1 Bolt v. Arapahoe County School Dist. No. Six, 898 P.2d 525, 101 Ed. Law Rep. 1185 (Colo. 1995).

2 Evans v. Utah, 21 F. Supp. 3d 1192 (D. Utah 2014) (applying Utah law); Landis v. Rockdale County, 206 Ga. App. 876, 427 S.E.2d 286 (1992); State v. Bates, 305 N.W.2d 426 (Iowa 1981); State v. Clay, 481 S.W.3d 531 (Mo. 2016).

3 State v. West, 285 So. 3d 605 (La. Ct. App. 5th Cir. 2019); State v. Rainey, 282 So. 3d 360 (La. Ct. App. 4th Cir. 2019); State v. Merritt, 467 S.W.3d 808 (Mo. 2015).

[4] Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County, 218 Cal. App. 4th 195, 159 Cal. Rptr. 3d 424 (1st Dist. 2013), as modified, (July 24, 2013); People v. Russell, 2014 COA 21M, 396 P.3d 71 (Colo. App. 2014), as modified on denial of reh'g, (May 8, 2014) and judgment aff'd on other grounds, 2017 CO 3, 387 P.3d 750 (Colo. 2017); People v. Anthony, 327 Mich. App. 24, 932 N.W.2d 202 (2019); Kilgore Independent School District v. Axberg, 572 S.W.3d 244, 366 Ed. Law Rep. 501 (Tex. App. Texarkana 2019), review denied, (Aug. 30, 2019).

[5] State ex rel. Tipler v. Gardner, 506 S.W.3d 922 (Mo. 2017).

[6] Norman v. Ambler, 46 So. 3d 178 (Fla. 1st DCA 2010).

[7] Greene v. Marin County Flood Control & Water Conservation Dist., 49 Cal. 4th 277, 109 Cal. Rptr. 3d 620, 231 P.3d 350 (2010).

[8] Nelson v. Ada, 878 F.2d 277, 54 Ed. Law Rep. 825 (9th Cir. 1989); In re Great Outdoors Colorado Trust Fund, 913 P.2d 533 (Colo. 1996); Brooks v. County of Onondaga, 167 A.D.2d 862, 561 N.Y.S.2d 963 (4th Dep't 1990); Worthing v. Deutsche Bank National Trust Company for Agent Securities Inc., 545 S.W.3d 127 (Tex. App. El Paso 2017).

[9] Succession of Fragala, 680 So. 2d 1345 (La. Ct. App. 2d Cir. 1996).

[10] Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County, 218 Cal. App. 4th 195, 159 Cal. Rptr. 3d 424 (1st Dist. 2013), as modified, (July 24, 2013).

[11] State v. Snowden, 2019-Ohio-3006, 140 N.E.3d 1112 (2019).

[12] Borough of Wrightstown v. Medved, 193 N.J. Super. 398, 474 A.2d 1077 (App. Div. 1984).

[13] Santa Barbara County Taxpayers Assn. v. County of Santa Barbara, 194 Cal. App. 3d 674, 239 Cal. Rptr. 769 (2d Dist. 1987); Bolt v. Arapahoe County School Dist. No. Six, 898 P.2d 525, 101 Ed. Law Rep. 1185 (Colo. 1995); State ex rel. Hall v. Vaughn, 483 S.W.2d 396 (Mo. 1972).

[14] Kilgore Independent School District v. Axberg, 572 S.W.3d 244, 366 Ed. Law Rep. 501 (Tex. App. Texarkana 2019), review denied, (Aug. 30, 2019).

15 Kilgore Independent School District v. Axberg, 572 S.W.3d 244, 366 Ed. Law Rep. 501 (Tex. App. Texarkana 2019), review denied, (Aug. 30, 2019).

16 Santa Barbara County Taxpayers Assn. v. County of Santa Barbara, 194 Cal. App. 3d 674, 239 Cal. Rptr. 769 (2d Dist. 1987); State v. Wacek, 703 P.2d 296 (Utah 1985).

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III. Operation and Effect of Constitutions and Amendments

C. Effect of Constitutions and Amendments on Existing Laws

§ 51. Effect of constitutions and amendments thereto on existing constitutional provisions—Repeal by implication

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 633

As a general matter, repeals by implication are not favored, and a repeal by implication will be found only when there is an irreconcilable conflict between constitutional provisions and where there exists no possible construction that could give both provisions effect.[1] Even then, the repeal of constitutional provisions by implication is applicable only to the extent of the conflict.[2] A repeal by implication in the case of constitutional provisions is more suspect and difficult to achieve than in the case of statutes because courts are dealing with the will of the voters and not the intent of legislators.[3]

While an amendment to a constitution and existing constitutional provisions should be construed so as to harmonize with each other,[4] where this is not possible, and they cannot be so construed as to have both provisions stand and leave to each a legitimate office, the amendment, being the latest expression of the

will of the people, prevails.[5] In this respect, distinct provisions of the constitution are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without material and substantial conflict.[6]

Footnotes

1 Silver Dollar Liquor, Inc. v. Red River Parish Police Jury, 56 So. 3d 265 (La. Ct. App. 2d Cir. 2010), writ granted, 57 So. 3d 322 (La. 2011) and decision aff'd on other grounds, 74 So. 3d 641 (La. 2011).

2 Jackson v. Consolidated Government of City of Jacksonville, 225 So. 2d 497 (Fla. 1969); Cunningham v. Exon, 207 Neb. 513, 300 N.W.2d 6 (1980).

3 City of Fayetteville v. Washington County, 369 Ark. 455, 255 S.W.3d 844, 233 Ed. Law Rep. 991 (2007).

4 Matter of Johnson, 568 P.2d 855 (Wyo. 1977).
As to the need for harmony, see § 67.

5 State v. Division of Bond Finance of Dept. of General Services, 278 So. 2d 614 (Fla. 1973).

6 State v. Butler, 70 Fla. 102, 69 So. 771 (1915).

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III. Operation and Effect of Constitutions and Amendments

C. Effect of Constitutions and Amendments on Existing Laws

§ 52. Effect of constitutions and amendments thereto on existing statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 632

When a new constitution is established, it is customary to insert a provision, commonly known as a savings clause,[1] that all statutes in force and not inconsistent with the new constitution will continue until amended or repealed by the legislature.[2] Therefore, a statute in force when a constitutional amendment is adopted ordinarily is not affected by it[3] and continues in force subsequent to the adoption and effective date of the amendment,[4] especially where the amendment is merely a reaffirmation or ratification of an existing statute,[5] unless the amendment contains some provision which expressly abrogates preexisting rights[6] or unless the new constitution[7] or the new amendment is clearly and irreconcilably in conflict with the statute.[8] Thus, when a court is considering the effect of constitutional amendments upon existing statutes, the statute will continue in effect unless it is completely inconsistent with the plain terms of the constitution.[9] Accordingly, in the context of criminal statutes, a statute valid when enacted, and made effective, is not invalidated by a subsequent amendment to the state

constitution, unless the amendment is designed to have that effect.[10] If by any fair course of reasoning a statute can be harmonized or reconciled with a new constitutional provision, then it is the duty of the courts to do so.[11] However, if there is a conflict between a statute and the constitution, the constitution is the superior rule of law in that situation.[12]

Wherever such a construction is possible, a new constitutional amendment must be held to amend existing statutory law to agree with such amendment.[13] A constitutional amendment takes the place of all the former laws existing upon the subject with which it deals.[14] Thus, a constitutional amendment which changes prior statutory procedure is superior to a legislative act and, in effect, repeals it.[15] Those statutes which are consistent with the new constitutional amendment and which were enacted before it was passed are just as operative and effective as those enacted subsequent to the adoption of the new constitutional provision.[16] However, a law which is on the statute books but which has been rendered ineffective by judicial construction of a constitutional amendment is not "in force" within the meaning of a saving clause in a subsequent amendment,[17] and it is also usually held that a constitutional amendment will not act to validate existing statutes or other enactments which were invalid prior to its adoption.[18]

It is the general rule that a state legislature has power to enact a statute not authorized by the existing constitution of that state when the statute is passed in anticipation of an amendment to its constitution authorizing it or which provides that it will take effect upon the adoption of an amendment to its constitution specifically authorizing and validating such statute.[19]

Footnotes

1 State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).

2 Sears v. City of Akron, 246 U.S. 242, 38 S. Ct. 245, 62 L. Ed. 688 (1918).

3 Petition of Pitchford, 265 Ark. 752, 581 S.W.2d 321 (1979).

4 State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).

5 State v. Ashmore, 236 Ga. 401, 224 S.E.2d 334 (1976).

6 Henslee v. Madison Guar. Sav. and Loan Ass'n, 297 Ark. 183, 760 S.W.2d 842 (1989).

[7] DeKalb County v. Allstate Beer, Inc., 229 Ga. 483, 192 S.E.2d 342 (1972).

[8] Henslee v. Madison Guar. Sav. and Loan Ass'n, 297 Ark. 183, 760 S.W.2d 842 (1989); Sublette County School Dist. Number Nine v. McBride, 2008 WY 152, 198 P.3d 1079, 240 Ed. Law Rep. 401 (Wyo. 2008).

[9] Bauduy as Next Friend of D.B. v. Adventist Health System/Sunbelt, Inc., 288 So. 3d 87 (Fla. 5th DCA 2019).

[10] Forest v. State, 257 So. 3d 603 (Fla. 1st DCA 2018).

[11] Bauduy as Next Friend of D.B. v. Adventist Health System/Sunbelt, Inc., 288 So. 3d 87 (Fla. 5th DCA 2019).

[12] City of Asheville v. State, 369 N.C. 80, 794 S.E.2d 759 (2016).

[13] DeKalb County v. Allstate Beer, Inc., 229 Ga. 483, 192 S.E.2d 342 (1972).

[14] Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014) (applying Oklahoma law); Fent v. Henry, 2011 OK 10, 257 P.3d 984 (Okla. 2011), as corrected, (Feb. 15, 2011).

[15] Petition of Pitchford, 265 Ark. 752, 581 S.W.2d 321 (1979).
A state constitutional amendment legalizing possession of small amounts of marijuana deprived the state of the power to continue to prosecute the defendant for possession of less than one ounce of marijuana after the amendment became effective, where the amendment became effective before the defendant's case was submitted to a jury. People v. Wolf, 2017 CO 4, 387 P.3d 753 (Colo. 2017).

[16] Hockett v. State Liquor Licensing Bd., 91 Ohio St. 176, 110 N.E. 485 (1915).

[17] Jelm v. Jelm, 155 Ohio St. 226, 44 Ohio Op. 246, 98 N.E.2d 401, 22 A.L.R.2d 1300 (1951).

[18] State v. Bates, 305 N.W.2d 426 (Iowa 1981).

[19] Evangelical Good Samaritan Soc. v. North Dakota Dept. of Human Services, 2015 ND 96, 862 N.W.2d 794 (N.D. 2015).

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III. Operation and Effect of Constitutions and Amendments

C. Effect of Constitutions and Amendments on Existing Laws

§ 53. Effect of constitutions and amendments thereto on existing statutes—Repeal by implication

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 632

The presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist.[1] Thus, it is the general rule that a statute existing at the time of adoption of a state constitution remains in force and effect and is not repealed by the enactment of a new constitution whose provisions are not inconsistent with the statute.[2] However, if there is a conflict between a statute and a new constitutional provision, the former must give way[3] since a constitutional amendment impliedly repeals a statute where the two are irreconcilably repugnant, such that both cannot stand.[4] All statutes which are actually inconsistent with a new constitution are repealed by implication unless they constitute contracts within the meaning of the federal provision prohibiting an impairment of the obligation of contracts.[5] Similarly, an amendment of the constitution must be held to amend the existing statute law to agree with such an amendment.[6] The test where a statute predates a conflicting constitutional provision is whether the statute could have been passed after the new constitutional

provision took effect; if not, repeal of the statute is implicit in adoption of the new constitutional provision.[7] If the legislature could have enacted the same law even after the adoption of later constitutional language, then the law would be constitutional; if not, then the law must be unconstitutional and void.[8]

Implied repeals of statutes by later constitutional provisions are not favored.[9] To effect a repeal by implication, the inconsistency between existing legislation and a new constitutional provision must be irreconcilable.[10] Such a statute cannot be upheld if it is opposed to the plain terms of the new constitution[11] or if the statute is inconsistent with the full operation of its provisions.[12] Otherwise, the statute will be deemed to be still in force and effect.[13]

A statute, valid when enacted, is not automatically repealed by implication with the adoption of a nonself-executing constitutional amendment on the same subject.[14] However, where a new constitutional provision is self-executing, an implied repeal of an existing statute is said to necessarily annul all inconsistent acts of the legislature passed prior to its adoption.[15] Repugnancy, inconsistency, and conflict between state statutes and self-executing state constitutional provisions are the basic factors in determining whether such statutes are repealed by implication with the adoption of a self-executing state constitutional provision.[16]

The rule that a statute, unconstitutional when it takes effect, is not resurrected by a subsequent constitutional change is not applicable to a statute which was passed in anticipation of an already approved constitutional change and which was of no force or effect until after the new change took effect.[17]

Footnotes

1 Thomas v. Nevada Yellow Cab Corp., 130 Nev. 484, 327 P.3d 518, 130 Nev. Adv. Op. No. 52 (2014).

2 State ex rel. Askew v. Thomas, 293 So. 2d 40 (Fla. 1974).
As to the supremacy of the United States Constitution and acts of Congress, and the inferiority of state constitutions and laws, see §§ 55 to 62.

3 Emhart Corp. v. Brantley, 257 So. 2d 273 (Fla. 3d DCA 1972); Macon v. Costa, 437 So. 2d 806 (La. 1983).

[4] Perry v. Terrible Herbst, Inc., 132 Nev. 767, 383 P.3d 257, 132 Nev. Adv. Op. No. 75 (2016).

[5] DeKalb County v. Allstate Beer, Inc., 229 Ga. 483, 192 S.E.2d 342 (1972); Macon v. Costa, 437 So. 2d 806 (La. 1983); State v. Keenan, 278 S.C. 361, 296 S.E.2d 676 (1982).
As to the obligation of contracts, generally, see §§ 747 to 782.

[6] Hollywood Cemetery Ass'n v. Powell, 210 Cal. 121, 291 P. 397, 71 A.L.R. 310 (1930); McKnight v. City of Decatur, 200 Ga. 611, 37 S.E.2d 915 (1946); Board of County Com'rs of Canadian County v. State Bd. of Equalization, 1961 OK 150, 363 P.2d 242 (Okla. 1961).

[7] State v. Strom, 2019 ND 9, 921 N.W.2d 660 (N.D. 2019).

[8] Schwartz v. Cuyahoga Cty. Bd. of Revision, 143 Ohio St. 3d 496, 2015-Ohio-3431, 39 N.E.3d 1223 (2015).

[9] Hassan v. Federal Election Com'n, 893 F. Supp. 2d 248 (D.D.C. 2012), aff'd without opinion, 2013 WL 1164506 (D.C. Cir. 2013); Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Com., 209 Cal. App. 4th 1182, 147 Cal. Rptr. 3d 696 (4th Dist. 2012), as modified on denial of reh'g, (Oct. 31, 2012); France v. East Central Bossier Fire Protection Dist. No. 1, 4 So. 3d 959 (La. Ct. App. 2d Cir. 2009), writ denied, 8 So. 3d 589 (La. 2009); Schwartz v. Cuyahoga Cty. Bd. of Revision, 143 Ohio St. 3d 496, 2015-Ohio-3431, 39 N.E.3d 1223 (2015).

[10] Henslee v. Madison Guar. Sav. and Loan Ass'n, 297 Ark. 183, 760 S.W.2d 842 (1989); Schwartz v. Cuyahoga Cty. Bd. of Revision, 143 Ohio St. 3d 496, 2015-Ohio-3431, 39 N.E.3d 1223 (2015).

[11] Macon v. Costa, 437 So. 2d 806 (La. 1983).

[12] France v. East Central Bossier Fire Protection Dist. No. 1, 4 So. 3d 959 (La. Ct. App. 2d Cir. 2009), writ denied, 8 So. 3d 589 (La. 2009).

[13] State ex rel. Oliver v. Crookham, 302 Or. 533, 731 P.2d 1018 (1987).

[14] DeKalb County v. Allstate Beer, Inc., 229 Ga. 483, 192 S.E.2d 342 (1972); Timm v. Schoenwald, 400 N.W.2d 260 (N.D. 1987).
As to distinctions between provisions which are and are not self-executing, see §§ 101 to

107.

15 Neal v. State of Delaware, 103 U.S. 370, 26 L. Ed. 567, 1880 WL 18868 (1880); Jelm v. Jelm, 155 Ohio St. 226, 44 Ohio Op. 246, 98 N.E.2d 401, 22 A.L.R.2d 1300 (1951).

16 State ex rel. Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977).

17 People ex rel. City of Salem v. McMackin, 53 Ill. 2d 347, 291 N.E.2d 807 (1972); People ex rel. Ogilvie v. Lewis, 49 Ill. 2d 476, 274 N.E.2d 87 (1971); State ex rel. Woodahl v. Straub, 164 Mont. 141, 520 P.2d 776 (1974).

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III. Operation and Effect of Constitutions and Amendments

C. Effect of Constitutions and Amendments on Existing Laws

§ 54. Effect of new constitution or amendment thereto on common law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 613

Constitutional rights prevail over common-law rights,[1] and constitutional mandates supersede contrary common-law rules and statutes.[2] Thus, common-law rights existing in equity[3] may be superseded or abrogated by a state in its constitution.[4] However, constitutional provisions do not repeal the common law by implication unless the intention to do so is plain.[5] The framers of a constitution are presumed to have intended no change or innovation in the common law further than what appears from the express declarations or reasonable implications, and the common law is repealed by such constitution to the extent that it is inconsistent therewith and only to that extent.[6]

Jural rights which were so well established prior to the adoption of a constitution are preserved by the constitution and may not be abolished by the legislature.[7]

Footnotes

[1] State v. Morgan, 163 Wash. App. 341, 261 P.3d 167 (Div. 1 2011).

[2] Schmidt v. Crawford, 584 S.W.3d 640 (Tex. App. Houston 1st Dist. 2019).

[3] Brandt v. Godfrey, 172 Misc. 768, 16 N.Y.S.2d 51 (Sup 1939), judgment aff'd without opinion, 260 A.D. 851, 23 N.Y.S.2d 464 (1st Dep't 1940).

[4] U.S. v. Harrison County, Miss., 399 F.2d 485 (5th Cir. 1968).
As to a change or abrogation of the common law by statute, see Am. Jur. 2d, Common Law § 15.

[5] Iowa Farm Bureau Federation v. Environmental Protection Com'n, 850 N.W.2d 403 (Iowa 2014).

[6] Western New York Water Co. v. Brandt, 259 A.D. 11, 18 N.Y.S.2d 128 (3d Dep't 1940).

[7] Kentucky Utilities Co. v. Jackson County Rural Elec. Co-op. Corp., 438 S.W.2d 788 (Ky. 1968).

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III. Operation and Effect of Constitutions and Amendments

D. Supremacy of Constitutions; Supreme Laws

1. Supremacy of United States Constitution and Laws

§ 56. Supremacy of United States Constitution and amendments thereto—Effect of emergency

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 502

An emergency, while it cannot create power, increase granted power, or remove or diminish the restrictions imposed upon the power granted or reserved, may allow the exercise of power already in existence but not exercised except during an emergency.[1]

The danger must be immediate and impending or the necessity urgent for the public service, such as will not admit of delay and where the action of the civil authority would be too late in providing the means which the occasion calls for.[2] For instance, there is no basis in the Constitution for the seizure of steel mills during a wartime labor dispute, despite the President's claim that the war effort would be crippled if the mills were shut down.[3]

The Supreme Court has not denied the reality of dangers from foreign or internal conflicts. Rather, it has recognized the need to respect constitutional requirements even in troubled times. Security interests may be affected by fluctuations in international trade and the supply of natural resources by social unrest at home and abroad and by public disclosure of policy deliberations; however, such events cannot routinely justify invasions of privacy or restrictions on expression without devaluing and eventually destroying those rights.[4] Nonetheless, the Court has recognized that authority of an emergency nature to protect national security information is vested in the President as head of the executive branch and as commander in chief.[5]

Footnotes

1 Veix v. Sixth Ward Building & Loan Ass'n of Newark, 310 U.S. 32, 60 S. Ct. 792, 84 L. Ed. 1061 (1940); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A.L.R. 1481 (1934).

2 Mitchell v. Harmony, 54 U.S. 115, 13 How. 115, 14 L. Ed. 75, 1851 WL 6662 (1851).

3 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952).

4 Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), aff'd in part, cert. dismissed in part, 452 U.S. 713, 101 S. Ct. 3132, 69 L. Ed. 2d 367 (1981).

5 Department of Navy v. Egan, 484 U.S. 518, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988).

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III. Operation and Effect of Constitutions and Amendments

D. Supremacy of Constitutions; Supreme Laws

1. Supremacy of United States Constitution and Laws

§ 57. Supremacy of federal laws made in pursuance of United States Constitution; supremacy of federal court decisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 502

West's Key Number Digest, States 18.3, 18.5

The United States Constitution provides that the laws of the United States made in pursuance of the Constitution are the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding.[1] Preemption of state law occurs through the direct operation of the Supremacy Clause.[2] The Supremacy Clause creates a rule of decision, under which courts must not give effect to state laws that conflict with federal laws.[3] Therefore, in those areas where the Constitution grants the federal government power to act, the Supremacy Clause dictates that federal enactments prevail over competing state exercises of power.[4] In other words, under the Supremacy Clause, federal law preempts

contrary state law.[5] Hence, state laws that conflict with federal law are without effect.[6] Also, a state law is void if it is contrary to a valid act of Congress[7] and is without effect[8] since Congress clearly has the power to preempt state laws.[9] In fact, by reason of the Supremacy Clause, Congress has virtually unfettered power to preempt state law.[10]

Federal statutes operate essentially as a part of the law of each state and are as binding on its authorities and people as are its own local constitution and laws,[11] and federal statutes are controlling over state constitutional[12] or statutory[13] provisions. Also, state policies[14] or regulations and orders of state administrative agencies[15] may not prevail where they conflict with valid enactments of Congress.[16] When federal law forbids an action that state law requires, state law is preempted.[17] Thus, state laws are always subordinate, and federal laws enacted pursuant to the Constitution are always paramount.[18]

The question in a preemption case is whether state law is preempted by a federal statute.[19] Whether a particular federal statute preempts state law depends upon congressional purpose.[20] In a preemption case, a state law should be displaced only to the extent that it actually conflicts with a federal law, and a federal court should not extend its invalidation of a state statute any further than necessary to dispose of the case before it.[21] Therefore, consideration of the continuing validity of a state statute under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace the state law.[22] Congress can indicate preemptive intent through a statute's express language, but even when there is an express preemption clause in a statute, the question of the substance and scope of Congress's displacement of state law still remains.[23] A federal statute implicitly overrides a state law either when the scope of the statute indicates that Congress intended[24] the federal law to occupy the field exclusively or when the state law is in actual conflict with the federal law,[25] but the exercise of federal jurisdiction in a particular area does not automatically result in displacing state laws that may relate to but are not in conflict with federal laws.[26]

The Supremacy Clause may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law.[27] Under the Supremacy Clause, the criteria for determining whether a state law has been preempted by an Act of Congress therefore are whether:

- Congress, in enacting a federal statute, expressed a clear intent to preempt state law[28]
- there is an outright or actual conflict between the federal and state law[29]
- it is physically impossible to comply with both state and federal requirements[30]
- there is implicit in the federal law a barrier to state regulation[31]
- Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law[32]
- the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress[33]

Practice Tip:

When attempting to determine whether a federal statute preempts a state statute, the question an attorney or court should ask, which is basically a question of congressional intent, is whether Congress, in enacting the federal statute, intended to exercise its constitutionally delegated authority to set aside the laws of a state; if so, the Supremacy Clause requires the court to follow federal, not state, law.[34]

State courts are bound by decisions of the United States Supreme Court as to federal law or the Constitution.[35] Although there is authority to the contrary, some jurisdictions adhere to the view that a state court is not bound by decisions of a federal court other than the United States Supreme Court, even though a federal question is involved.[36] State courts are not bound to follow a decision of a federal court, including the United States Supreme Court, dealing with state law. However, where federal and state statutes are similar and are intended to accomplish the same objects, state courts, in construing the state statutes, will be strongly inclined to follow federal court construction, especially where the state law was purposely modeled on the corresponding federal statute.[37]

Footnotes

1 U.S. Const. Art. VI, cl. 2.

2 Kurns v. Railroad Friction Products Corp., 565 U.S. 625, 132 S. Ct. 1261, 182 L. Ed. 2d 116, 78 A.L.R. Fed. 2d 677 (2012).

3 Armstrong v. Exceptional Child Center, Inc., 575 U.S. 320, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015).

4 U. S. v. Gillock, 445 U.S. 360, 100 S. Ct. 1185, 63 L. Ed. 2d 454, 5 Fed. R. Evid. Serv. 945 (1980).

5 Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 194 L. Ed. 2d 414 (2016); Sarrazin v. Coastal, Inc., 311 Conn. 581, 89 A.3d 841 (2014); Bourgoin v. Twin Rivers Paper Company, LLC, 2018 ME 77, 187 A.3d 10 (Me. 2018).

[6] Mutual Pharmaceutical Co., Inc. v. Bartlett, 570 U.S. 472, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013).

[7] Perez v. Campbell, 402 U.S. 637, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971); Puglia v. Elk Pipeline, Inc., 226 N.J. 258, 141 A.3d 1187 (2016).

[8] Munoz v. Branch Banking, 131 Nev. 185, 348 P.3d 689, 131 Nev. Adv. Op. No. 23 (2015).

[9] Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas, 489 U.S. 493, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (1989).

[10] State v. Sarrabea, 126 So. 3d 453 (La. 2013).

[11] Northern Securities Co. v. U.S., 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904).

[12] U.S. v. Dallas Nat. Bank, 152 F.2d 582 (C.C.A. 5th Cir. 1945); People v. Sischo, 23 Cal. 2d 478, 144 P.2d 785, 150 A.L.R. 1431 (1943).

[13] Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996).

[14] Livadas v. Bradshaw, 512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994).

[15] Rice v. Board of Trade of City of Chicago, 331 U.S. 247, 67 S. Ct. 1160, 91 L. Ed. 1468 (1947); Penn Dairies v. Milk Control Commission of Pennsylvania, 318 U.S. 261, 63 S. Ct. 617, 87 L. Ed. 748 (1943).
As to supremacy of federal administrative rules and regulations, see § 58.

[16] Mutual Pharmaceutical Co., Inc. v. Bartlett, 570 U.S. 472, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013).

[17] Mutual Pharmaceutical Co., Inc. v. Bartlett, 570 U.S. 472, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013).

[18] State of Florida v. Mellon, 273 U.S. 12, 47 S. Ct. 265, 71 L. Ed. 511 (1927).

[19] POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 134 S. Ct. 2228, 189 L. Ed. 2d

141 (2014).

[20] U.S. Bank Nat. Ass'n v. Schipper, 812 F. Supp. 2d 963 (S.D. Iowa 2011).

[21] Dalton v. Little Rock Family Planning Services, 516 U.S. 474, 116 S. Ct. 1063, 134 L. Ed. 2d 115 (1996).

[22] Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993).

[23] Franks Inv. Co. LLC v. Union Pacific R. Co., 593 F.3d 404 (5th Cir. 2010).

[24] Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994); Franks Inv. Co. LLC v. Union Pacific R. Co., 593 F.3d 404 (5th Cir. 2010).

[25] Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995); Franks Inv. Co. LLC v. Union Pacific R. Co., 593 F.3d 404 (5th Cir. 2010).

[26] Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996).

[27] Roma, III, Ltd. v. Board of Appeals of Rockport, 478 Mass. 580, 88 N.E.3d 269 (2018); Lee v. Astoria Generating Co., L.P., 13 N.Y.3d 382, 892 N.Y.S.2d 294, 920 N.E.2d 350 (2009).

[28] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407, 17 U.C.C. Rep. Serv. 2d 1087 (1992); US Airways, Inc. v. O'Donnell, 627 F.3d 1318 (10th Cir. 2010); Youngbluth v. Youngbluth, 188 Vt. 53, 2010 VT 40, 6 A.3d 677 (2010).

[29] CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993); In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation, 623 F.3d 1200 (8th Cir. 2010); Yates-Williams v. Nihum, 268 F.R.D. 566 (S.D. Tex. 2010); In re Westby, 473 B.R. 392 (Bankr. D. Kan. 2012), decision aff'd on other grounds, 486 B.R. 509 (B.A.P. 10th Cir. 2013); Gonzalez v. State, 207 A.3d 147 (Del. 2019); Youngbluth v. Youngbluth, 188 Vt. 53, 2010 VT 40, 6 A.3d 677 (2010).

[30] Freightliner Corp. v. Myrick, 514 U.S. 280, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995); In re Westby, 473 B.R. 392 (Bankr. D. Kan. 2012), decision aff'd on other grounds, 486

B.R. 509 (B.A.P. 10th Cir. 2013); State v. Volkswagen AG, 279 So. 3d 1109 (Ala. 2018); Matter of Braunstein, 2020 WL 759223 (N.H. 2020); Puerini v. LaPierre, 208 A.3d 1157 (R.I. 2019); Resident Action Council v. Seattle Housing Authority, 177 Wash. 2d 417, 327 P.3d 600 (2013), as amended on denial of reh'g, (Jan. 10, 2014).

[31] Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992).

[32] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407, 17 U.C.C. Rep. Serv. 2d 1087 (1992); US Airways, Inc. v. O'Donnell, 627 F.3d 1318 (10th Cir. 2010); Solus Industrial Innovations, LLC v. Superior Court, 4 Cal. 5th 316, 228 Cal. Rptr. 3d 406, 410 P.3d 32 (Cal. 2018), cert. denied, 139 S. Ct. 376, 202 L. Ed. 2d 286 (2018); Murphy v. Town of Darien, 332 Conn. 244, 210 A.3d 56 (2019), cert. denied, 2020 WL 129653 (U.S. 2020); Youngbluth v. Youngbluth, 188 Vt. 53, 2010 VT 40, 6 A.3d 677 (2010).

[33] Williamson v. Mazda Motor of America, Inc., 562 U.S. 323, 131 S. Ct. 1131, 179 L. Ed. 2d 75 (2011); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986); Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986); In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation, 623 F.3d 1200 (8th Cir. 2010); US Airways, Inc. v. O'Donnell, 627 F.3d 1318 (10th Cir. 2010); Smith v. Psychiatric Solutions, Inc., 750 F.3d 1253, 88 Fed. R. Serv. 3d 721 (11th Cir. 2014); In re Westby, 473 B.R. 392 (Bankr. D. Kan. 2012), decision aff'd on other grounds, 486 B.R. 509 (B.A.P. 10th Cir. 2013); Matter of Braunstein, 2020 WL 759223 (N.H. 2020).

[34] Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996).

[35] Am. Jur. 2d, Courts § 143.

[36] Am. Jur. 2d, Courts § 144.

[37] Am. Jur. 2d, Courts § 142.

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III. Operation and Effect of Constitutions and Amendments

D. Supremacy of Constitutions; Supreme Laws

1. Supremacy of United States Constitution and Laws

§ 58. Supremacy of federal administrative rules, regulations, and determinations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 502

West's Key Number Digest, States 18.3, 18.9

Federal regulations have no less preemptive effect than federal statutes.[1] The question is whether state law is preempted by federal agency action.[2] In case of a conflict between the regulations and orders of a state commission on a subject properly within the jurisdiction of a federal agency or commission which has acted on the subject by issuing its own regulations or orders, the former must yield to the latter[3] since the term "laws of the United States" as used in the Supremacy Clause[4] encompasses both federal statutes and statutorily authorized federal agency regulations.[5] A ruling of a federal agency that it has jurisdiction in a particular matter may thus preclude a state agency from taking jurisdiction,[6] and state courts are bound by the lawfully authorized acts of the federal agency.[7] Furthermore, federal regulations

may preempt established policies concerning the application of state statutes that conflict with federal mandates.[8]

Where state and federal authorities have concurrent powers, orders, and regulations of state, administrative agencies may operate so long as Congress has not preempted the field by its own enactments[9] and where the state regulations are not at variance with the federal regulations.[10] However, where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.[11] Express preemption exists where a federal regulation contains explicit language indicating that a specific type of state law is preempted.[12] Field preemption exists where a scheme of federal regulation is so pervasive as to make a reasonable inference that Congress left no room for the states to supplement it.[13] Accordingly, under the Supremacy Clause, even in the absence of express preemptive language,[14] Congress's intent to preempt all state laws in a particular area may be inferred where there is a need for uniformity[15] or where the scheme of federal regulation is sufficiently comprehensive as to make a reasonable inference that Congress left no room for supplemental state regulation.[16] Conflict preemption occurs where compliance with both federal and state regulations is a physical impossibility,[17] or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[18] While federal agencies have no special authority to pronounce on preemption issues absent delegation by Congress, they do have a unique understanding of the statutes that they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[19]

State statutes, as well as municipal ordinances,[20] may be rendered inoperable and unenforceable,[21] suspended, or preempted to the extent to which they conflict with valid regulations or orders of federal administrative agencies.[22] However, it should never be presumed that Congress intends to supersede or suspend the exercise of the reserved powers of the state,[23] even where that may be done, and except so far as its purpose to do so is clearly manifested in the statute under construction, an order of a subordinate agency should not be given precedence over a state statute otherwise valid unless it conforms to a high standard of certainty.[24] Furthermore, under the Supremacy Clause, a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority,[25] for an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it.[26] Under the Supremacy Clause, a federal agency acting within the scope of its congressionally delegated authority may render unenforceable state or local laws that are otherwise not inconsistent with federal law.[27]

Footnotes

[1] D & S Remodelers, Inc. v. Wright National Flood Insurance Services, LLC, 725 Fed. Appx. 350 (6th Cir. 2018); Sheffield v. City of Fort Thomas, Ky., 620 F.3d 596 (6th Cir. 2010); In re Biozoom, Inc. Securities Litigation, 93 F. Supp. 3d 801 (N.D. Ohio 2015). As to preemptive effect of federal laws, see § 57.

[2] POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 134 S. Ct. 2228, 189 L. Ed. 2d 141 (2014).

[3] CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993); Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

[4] § 57.

[5] Lynnbrook Farms v. Smithkline Beecham Corp., 79 F.3d 620 (7th Cir. 1996).

[6] Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 62 S. Ct. 384, 86 L. Ed. 371 (1942).

[7] Marine Engineers Beneficial Ass'n v. Interlake S. S. Co., 370 U.S. 173, 82 S. Ct. 1237, 8 L. Ed. 2d 418 (1962); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958).

[8] Ability Center of Greater Toledo v. Lumpkin, 808 F. Supp. 2d 1003 (N.D. Ohio 2011).

[9] Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301, 69 S. Ct. 584, 93 L. Ed. 691 (1949); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 315 U.S. 786, 62 S. Ct. 491, 86 L. Ed. 754, 86 L. Ed. 1223 (1942).

[10] Rice v. Board of Trade of City of Chicago, 331 U.S. 247, 67 S. Ct. 1160, 91 L. Ed. 1468 (1947); State ex rel. State Bd. of Mediation v. Pigg, 362 Mo. 798, 244 S.W.2d 75 (1951).

[11] Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947); Case v. Bowles, 327 U.S. 92, 66 S. Ct. 438, 90 L. Ed. 552 (1946).

[12] Wilhite v. Howmedica Osteonics Corp., 833 F. Supp. 2d 753 (N.D. Ohio 2011);

Fulgenzi v. Wyeth, Inc., 686 F. Supp. 2d 715 (N.D. Ohio 2010).

[13] Wilhite v. Howmedica Osteonics Corp., 833 F. Supp. 2d 753 (N.D. Ohio 2011); Fulgenzi v. Wyeth, Inc., 686 F. Supp. 2d 715 (N.D. Ohio 2010).

[14] Lynnbrook Farms v. Smithkline Beecham Corp., 79 F.3d 620 (7th Cir. 1996).

[15] Boyle v. United Technologies Corp., 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988).

[16] Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985).

[17] Wilhite v. Howmedica Osteonics Corp., 833 F. Supp. 2d 753 (N.D. Ohio 2011); Fulgenzi v. Wyeth, Inc., 686 F. Supp. 2d 715 (N.D. Ohio 2010); Giggers v. Memphis Housing Authority, 363 S.W.3d 500 (Tenn. 2012).

[18] Wilhite v. Howmedica Osteonics Corp., 833 F. Supp. 2d 753 (N.D. Ohio 2011); Fulgenzi v. Wyeth, Inc., 686 F. Supp. 2d 715 (N.D. Ohio 2010).

[19] Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009).

[20] Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983).
For purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws. Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985).

[21] NCNB Texas Nat. Bank v. Cowden, 895 F.2d 1488 (5th Cir. 1990).

[22] Medtronic, Inc. v. Lohr, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700, 29 U.C.C. Rep. Serv. 2d 1077 (1996); Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986).

[23] Robards v. Cotton Mill Associates, 677 A.2d 540, 22 A.D.D. 1202 (Me. 1996).

[24] Illinois Cent. R. Co. v. Public Utilities Commission of Illinois, 245 U.S. 493, 38 S. Ct. 170, 62 L. Ed. 425 (1918).
It is appropriate to expect a federal administrative regulation to declare any intention to

preempt state law with some specificity because agencies normally address problems in a detailed manner and can speak through a variety of means; if a federal agency does not speak to the question of preemption, the United States Supreme Court will pause before saying that the mere volume and complexity of the agency's regulations indicate that the agency did in fact intend to preempt state law. California Coastal Com'n v. Granite Rock Co., 480 U.S. 572, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987).

[25] Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 203 L. Ed. 2d 822 (2019); Louisiana Public Service Com'n v. F.C.C., 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986); Sheffield v. City of Fort Thomas, Ky., 620 F.3d 596 (6th Cir. 2010).

[26] Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 203 L. Ed. 2d 822 (2019).

[27] Reid v. Johnson & Johnson, 780 F.3d 952 (9th Cir. 2015).

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III. Operation and Effect of Constitutions and Amendments

D. Supremacy of Constitutions; Supreme Laws

1. Supremacy of United States Constitution and Laws

§ 59. Supremacy of treaties

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West's Key Number Digest

West's Key Number Digest, International Law 302 to 308

Under the United States Constitution, the President is given the authority, by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the senators present concur.[1] All treaties made, or which will be made, under the authority of the United States, under the Constitution's Supremacy Clause, become a part of the supreme law of the United States.[2] Thus, United States treaties are the supreme law of the land,[3] and the Constitution's Supremacy Clause gives a treaty, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, the force of federal law.[4] However, a treaty cannot be considered as the law of the land within the meaning of the Federal Constitution, and as such binding on the courts, if in making it, the limits of the treaty-making power have been exceeded.[5]

Observation:

Among the more notable of the many treaties entered into by the United States are:

- the United Nations Charter[6]
- the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters[7]
- the Panama Canal Treaty[8]
- the Hague Convention on the Civil Aspects of International Child Abduction[9]
- the Warsaw Convention establishing the liability of international air carriers for harm to passengers and goods thereon[10]
- the Charter of the Organization of American States[11]

Treaties, to the extent that they are self-executing,[12] or, if nonself-executing, to the extent that Congress has implemented them by legislation[13] and conventions[14] (but not through so-called executive agreements),[15] have the force and effect of legislative enactments.[16] Nonself-executing treaties constitute international law commitments but are not themselves part of binding federal law.[17] A crucial distinction between a self-executing treaty and a nonself-executing one is that the former, but not the latter, can provide a judicially enforceable source of preemptive law under the Supremacy Clause.[18]

Treaties are of equal dignity with the laws of Congress[19] and override and supersede earlier conflicting federal statutes[20] (but not later-enacted federal statutes),[21] as well as conflicting state statutes,[22] local ordinances,[23] and state constitutional provisions.[24] Moreover, a state law that burdens a treaty-protected right is preempted by the treaty.[25] When a self-executing treaty and a statute address the same matter, courts must endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; however, if the two are inconsistent, the one last in date will control the other.[26] A treaty does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing.[27]

By express command of the United States Constitution, the judges in every state are bound by the treaties of the United States, anything in the Constitution or laws of any state to the contrary notwithstanding,[28] and all courts, state and national, must take judicial notice of a treaty of the United States.[29] In fact, by virtue of the Supremacy Clause, the terms of a treaty or convention entered into by the United States can even limit the exercise of jurisdiction by state courts.[30]

Treaties should be given authoritative effect[31] and a liberal interpretation to foster their apparent purposes.[32] Nonetheless, while treaties are to be liberally construed, no construction should be made that infringes upon the United States Constitution itself or that restricts the inherent powers of the states.[33] The United States government must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution.[34] The treaty power allows Congress to exercise powers that are not otherwise enumerated in the Constitution, but treaties do not empower Congress to violate the

Constitution.[35]

There is no limitation as to subject matter on the treaty-making power as exists in the case of the legislative power, although the federal power does not extend to the making of treaties which change the Constitution[36] or which are inconsistent with our form of government, with the relations of the states and the United States, or with the Federal Constitution, nor does it extend so far as to authorize a cession of any portion of the territory of one of the states without its consent.[37]

Footnotes

1 U.S. Const. Art. II, § 2, cl. 2.

2 U.S. Const. Art. VI, cl. 2.

3 Interest of T.M.E., 565 S.W.3d 383 (Tex. App. Texarkana 2018).

4 Luxottica Group S.p.A. v. Partnerships and Unincorporated Associations Identified on Schedule "A", 391 F. Supp. 3d 816 (N.D. Ill. 2019), reconsideration denied in part, 2019 WL 2357011 (N.D. Ill. 2019).

5 Asakura v. City of Seattle, 265 U.S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924), opinion amended on other grounds, 44 S. Ct. 634 (1924).

6 Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955); In re Alien Children Ed. Litigation, 501 F. Supp. 544 (S.D. Tex. 1980), opinion after summary affirmance by Court of Appeal, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786, 4 Ed. Law Rep. 953 (1982).

7 Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986); Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 42, 39 Fed. R. Serv. 2d 1043 (D.D.C. 1984); Ex parte Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880 (Ala. 1983); Semet Lickstein Morgenstern Berger Friend Brooke & Gordon, P.A. v. Sawada, 643 So. 2d 1188 (Fla. 3d DCA 1994); Gapanovich v. Komori Corp., 255 N.J. Super. 607, 605 A.2d 1120 (App. Div. 1992); Rissew v. Yamaha Motor Co., Ltd., 129 A.D.2d 94, 515 N.Y.S.2d 352 (4th Dep't 1987); Cipolla v. Picard Porsche Audi, Inc., 496 A.2d 130 (R.I. 1985).
Under the Supremacy Clause contained in the United States Constitution, the Hague

Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies. Daskin v. Knowles, 193 A.3d 717 (Del. 2018); Loeb v. First Jud. Dist. Ct., 129 Nev. 595, 309 P.3d 47, 129 Nev. Adv. Op. No. 62 (2013).

[8] O'Connor v. U.S., 479 U.S. 27, 107 S. Ct. 347, 93 L. Ed. 2d 206 (1986).

[9] Loos v. Manuel, 278 N.J. Super. 607, 651 A.2d 1077 (Ch. Div. 1994).

[10] Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982); In re Korean Air Lines Disaster of Sept. 1, 1983, 814 F. Supp. 592 (E.D. Mich. 1993); L.B. Smith, Inc. v. Circle Air Freight Corp., 128 Misc. 2d 12, 488 N.Y.S.2d 547 (Sup 1985).

[11] In re Alien Children Ed. Litigation, 501 F. Supp. 544 (S.D. Tex. 1980), opinion after summary affirmance by Court of Appeal, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786, 4 Ed. Law Rep. 953 (1982).

[12] Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5 (1936).
Although the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction is a binding international agreement, it is not self-executing; that is, the Convention creates obligations only for state parties and does not by itself give rise to domestically enforceable federal law absent implementing legislation passed by Congress. Bond v. U.S., 572 U.S. 844, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014).
As to executory and self-executing treaties, generally, see Am. Jur. 2d, Treaties § 2.

[13] Mirela v. United States, 416 F. Supp. 3d 98 (D. Conn. 2019); United States v. Nagarwala, 350 F. Supp. 3d 613 (E.D. Mich. 2018), appeal dismissed, 2019 WL 7425389 (6th Cir. 2019); United States v. Ryan, 2019 WL 7556053 (W.D. Wis. 2019).

[14] Ex parte Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880 (Ala. 1983); Aspinall's Club Ltd. v. Aryeh, 86 A.D.2d 428, 450 N.Y.S.2d 199 (2d Dep't 1982).

[15] Swearingen v. U.S., 565 F. Supp. 1019 (D. Colo. 1983).

[16] Valentine v. U.S. ex rel. Neidecker, 299 U.S. 5, 57 S. Ct. 100, 81 L. Ed. 5 (1936); Retfalvi v. United States, 930 F.3d 600 (4th Cir. 2019); Safdar v. Aziz, 327 Mich. App. 252, 933 N.W.2d 708 (2019), appeal denied, 504 Mich. 964, 932 N.W.2d 784 (2019).

[17] Sluss v. United States Department of Justice, International Prisoner Transfer Unit, 898

F.3d 1242 (D.C. Cir. 2018).

18 Foresight Energy, LLC v. Certain London Market Insurance Companies, 311 F. Supp. 3d 1085 (E.D. Mo. 2018).

19 Brown-Thomas v. Hynie, 367 F. Supp. 3d 452 (D.S.C. 2019).

20 Lemnitzer v. Philippine Airlines, 783 F. Supp. 1238 (N.D. Cal. 1991); Swearingen v. U.S., 565 F. Supp. 1019 (D. Colo. 1983).

21 U.S. v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D. N.Y. 1988).

22 Santovincenzo v. Egan, 284 U.S. 30, 52 S. Ct. 81, 76 L. Ed. 151 (1931).

23 Asakura v. City of Seattle, 265 U.S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924), opinion amended on other grounds, 44 S. Ct. 634 (1924).

24 Ex parte Ah Cue, 101 Cal. 197, 35 P. 556 (1894).

25 Washington State Department of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 203 L. Ed. 2d 301 (2019).

26 Retfalvi v. United States, 930 F.3d 600 (4th Cir. 2019).

27 Estate of Herzog, 33 Cal. App. 5th 894, 245 Cal. Rptr. 3d 498 (4th Dist. 2019).

28 U.S. Const. Art. VI, cl. 2.

29 Advance Footwear Co., Inc. v. Air Jamaica, Ltd., 124 Misc. 2d 6, 476 N.Y.S.2d 438 (Sup 1984).

30 State v. Doering-Sachs, 652 So. 2d 420 (Fla. 3d DCA 1995).

31 U.S. v. Vreeken, 603 F. Supp. 715 (D. Utah 1984), judgment aff'd on other grounds, 803 F.2d 1085, 21 Fed. R. Evid. Serv. 1338 (10th Cir. 1986).

32 Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 42, 39 Fed. R. Serv. 2d 1043 (D.D.C. 1984); L.B. Smith, Inc. v. Circle Air Freight Corp., 128 Misc. 2d 12, 488 N.Y.S.2d 547 (Sup 1985).

[33] Pena v. Industrial Commission of Arizona, 140 Ariz. 510, 683 P.2d 309 (Ct. App. Div. 1 1984).

[34] United States v. Ryan, 2019 WL 7556053 (W.D. Wis. 2019).

[35] United States v. Ryan, 2019 WL 7556053 (W.D. Wis. 2019).

[36] Seery v. U. S., 130 Ct. Cl. 481, 127 F. Supp. 601 (1955).

[37] De Geofroy v. Riggs, 133 U.S. 258, 10 S. Ct. 295, 33 L. Ed. 642 (1890).

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16 Am. Jur. 2d Constitutional Law § 60

American Jurisprudence, Second Edition | February 2021 Update

Constitutional Law
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III. Operation and Effect of Constitutions and Amendments

D. Supremacy of Constitutions; Supreme Laws

1. Supremacy of United States Constitution and Laws

§ 60. Supremacy of treaties—Indian treaties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Indians 124

The United States, as guardian of Indians, deals only with Indian nations, tribes, or bands and does not enter into contracts, compacts, or treaties with individual Indians.[1] The law pertaining to Indian treaties also applies to tribal agreements that are ratified by Congress.[2] A treaty with an Indian tribe constitutes a grant of rights from them, not a grant of rights from the United States to the Indians.[3] Treaties with federally recognized Indian tribes constitute federal law that preempts conflicting state law as applied to off-reservation activity by Indians.[4] Even if a state statute indirectly burdened a treaty right held by an Indian tribe, the statute would still be preempted.[5]

Caution:

Until 1871, Indian tribes were recognized by the United States as possessing the attributes of nations to the extent that treaties were made with them, but in that year, Congress, by statute, declared its intention thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them, instead of by treaty. Consequently, since that time, Indian affairs have been regulated by acts of Congress.[6]

A treaty with an Indian tribe should be construed liberally in favor of Indians.[7] Any doubts or ambiguities concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe.[8] Thus, language used in treaties with Indians should never be construed to their prejudice.[9] When analyzing the meaning of a tribal treaty's language, courts look beyond the written words to the larger context that frames the treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties.[10] An examination of the historical context is especially important when construing an Indian treaty because it provides insight into how the parties to the treaty understood the agreement,[11] and treaties are construed, not according to the technical meaning of their words to learned lawyers,[12] but in the sense in which they would naturally be understood by the Indians.[13] In interpreting an Indian treaty, the court attempts to determine what the parties meant by the treaty but stops short of varying its terms to meet alleged injustices.[14]

An Indian treaty becomes a part of the law of the land, supersedes all customs contrary thereto, and cannot be annulled either in effect or operation by the courts or state legislatures.[15] Prolonged nonenforcement, without preemption, does not extinguish Indian rights under a treaty.[16]

Observation:

The Indian sovereignty doctrine which historically gives state law no role to play within a tribe's territorial boundaries provides the backdrop against which all applicable Indian treaties and federal statutes must be read.[17]

Congress has the power to abrogate the provisions of an Indian treaty, though presumably such power

will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty but also may demand, in the interest of the country and the Indians themselves, that it should do so.[18] Congress's intention to abrogate Indian treaty rights must be clear and plain,[19] and Indian treaty rights will not be abrogated absent explicit statutory language indicating Congress's intent to invalidate or modify the right in question.[20] There is a presumption that a statute does not modify or abrogate Indian treaty rights.[21] Rights not explicitly abrogated in a treaty are presumed to have been reserved by the Indian tribe.[22]

CUMULATIVE SUPPLEMENT

Cases:

When conducting inquiry into whether United States has trust duty to Indian tribe and scope of any such duty, court resolves ambiguities in statutes and treaties in tribe's favor. Rosebud Sioux Tribe v. United States, 450 F. Supp. 3d 986 (D.S.D. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Am. Jur. 2d, Indians; Native Americans § 48.

2 In re CSRBA Case No. 49576 Subcase No. 91-7755, 165 Idaho 517, 448 P.3d 322 (2019).

3 In re CSRBA Case No. 49576 Subcase No. 91-7755, 165 Idaho 517, 448 P.3d 322 (2019).

4 Washington State Department of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 203 L. Ed. 2d 301 (2019).

5 Washington State Department of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 203 L. Ed. 2d 301 (2019).

[6] U.S. v. Baker, 63 F.3d 1478 (9th Cir. 1995), as amended on denial of reh'g and reh'g en banc, (Oct. 6, 1995).

[7] Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995); Richard v. U.S., 677 F.3d 1141 (Fed. Cir. 2012); Pueblo of Jemez v. United States, 366 F. Supp. 3d 1234, 107 Fed. R. Evid. Serv. 1220 (D.N.M. 2018); Cheyenne River Sioux Tribe v. Jewell, 205 F. Supp. 3d 1052 (D.S.D. 2016); Kloker v. Fort Peck Tribes, 15 Am. Tribal Law 292, 2018 WL 7324879 (Fort Peck C.A. 2018); White v. Schneiderman, 31 N.Y.3d 543, 81 N.Y.S.3d 326, 106 N.E.3d 709 (2018), cert. denied, 139 S. Ct. 432, 202 L. Ed. 2d 318 (2018).

[8] Herrera v. Wyoming, 139 S. Ct. 1686, 203 L. Ed. 2d 846 (2019); Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 105 S. Ct. 3420, 87 L. Ed. 2d 542 (1985); Makah Indian Tribe v. Quileute Indian Tribe, 873 F.3d 1157 (9th Cir. 2017), cert. denied, 139 S. Ct. 106, 202 L. Ed. 2d 197 (2018); Robinson v. Salazar, 838 F. Supp. 2d 1006 (E.D. Cal. 2012); United States v. Cleveland, 356 F. Supp. 3d 1215 (D.N.M. 2018), appeal dismissed, (10th Cir. 19-2013) (Feb. 8, 2019); Kloker v. Fort Peck Tribes, 15 Am. Tribal Law 292, 2018 WL 7324879 (Fort Peck C.A. 2018).

[9] United States v. Washington, 853 F.3d 946 (9th Cir. 2017), cert. granted, 138 S. Ct. 735, 199 L. Ed. 2d 602 (2018) and aff'd by an equally divided court, 138 S. Ct. 1832, 201 L. Ed. 2d 200 (2018).

[10] U.S. v. Brown, 777 F.3d 1025 (8th Cir. 2015); Cherokee Nation v. Bernhardt, 936 F.3d 1142 (10th Cir. 2019); Cherokee Nation v. Nash, 267 F. Supp. 3d 86 (D.D.C. 2017); Cheyenne River Sioux Tribe v. Jewell, 205 F. Supp. 3d 1052 (D.S.D. 2016).

[11] Little Traverse Bay Band of Odawa Indians v. Whitmer, 398 F. Supp. 3d 201 (W.D. Mich. 2019).

[12] United States v. Washington, 853 F.3d 946 (9th Cir. 2017), cert. granted, 138 S. Ct. 735, 199 L. Ed. 2d 602 (2018) and aff'd by an equally divided court, 138 S. Ct. 1832, 201 L. Ed. 2d 200 (2018); Cherokee Nation v. Bernhardt, 936 F.3d 1142 (10th Cir. 2019).

[13] Herrera v. Wyoming, 139 S. Ct. 1686, 203 L. Ed. 2d 846 (2019); Cherokee Nation v. Bernhardt, 936 F.3d 1142 (10th Cir. 2019); White v. Schneiderman, 31 N.Y.3d 543, 81 N.Y.S.3d 326, 106 N.E.3d 709 (2018), cert. denied, 139 S. Ct. 432, 202 L. Ed. 2d 318 (2018); Wells Fargo Bank, Nat. Ass'n v. Apache Tribe of Oklahoma, 2015 OK CIV APP 10, 360 P.3d 1243 (Div. 2 2014).

[14] Jones v. United States, 846 F.3d 1343 (Fed. Cir. 2017).

[15] State v. McCormack, 117 Wash. 2d 141, 812 P.2d 483 (1991).

[16] Richard v. U.S., 677 F.3d 1141 (Fed. Cir. 2012).

[17] Oklahoma Tax Com'n v. Sac and Fox Nation, 508 U.S. 114, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993).

[18] U.S. v. Dion, 476 U.S. 734, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986).

[19] South Dakota v. Bourland, 508 U.S. 679, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993).

[20] Swinomish Indian Tribal Community v. BNSF Railway Company, 228 F. Supp. 3d 1171 (W.D. Wash. 2017), aff'd, 2020 WL 1038679 (9th Cir. 2020).

[21] Reich v. Great Lakes Indian Fish and Wildlife Com'n, 4 F.3d 490 (7th Cir. 1993).

[22] U.S. v. Wilbur, 674 F.3d 1160 (9th Cir. 2012).

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16 Am. Jur. 2d Constitutional Law § 61

American Jurisprudence, Second Edition | February 2021 Update

Constitutional Law
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III. Operation and Effect of Constitutions and Amendments

D. Supremacy of Constitutions; Supreme Laws

2. Supremacy of State Constitutions

§ 61. Supremacy of state constitutions, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 502

West's Key Number Digest, States 4 to 4.1(2), 18.5

A state constitution is the supreme written will of the people of a state regarding the framework for their government[1] and is subject only to the limitations found in[2] and the restraints resulting from the Constitution of the United States;[3] local constitutions do not trump federal action,[4] and a state constitution does not contravene its federal counterpart.[5] A state constitution is the fundamental,[6] supreme,[7] preeminent,[8] paramount law of a state,[9] and a state constitution is the highest form and expression of law that exists in the state.[10] Courts must, under all circumstances, protect the supremacy of the constitution as a means of protecting the republican form of government and individual freedoms.[11]

A state constitution declares general principles or policies, establishes a foundation for the law and the government,[12] and reflects the will of the people.[13] A constitution is enacted by the people themselves in their sovereign capacity,[14] and no one has a right to ignore or disregard its mandates.[15] A state constitution stands above legislative and judge-made law,[16] and thus, executive officers and the judiciary cannot lawfully act beyond its limitations.[17] Moreover, a state's constitution limits the power of the legislature,[18] and the constitution is superior to any ordinary act of the legislature.[19]

Constitutional provisions restrict the conduct of the state government,[20] and a state constitution is binding upon all the departments of government of the state, all its officers, all its agencies, all its citizens, and all persons whomsoever within its jurisdiction.[21] Thus, no function of government can be discharged in disregard of or in opposition to the fundamental law.[22]

While the text of a state constitution must always be the primary guide to the purpose of a constitutional provision, it must be interpreted in a principled way that takes into account the history, structure, and underlying values of the document.[23] Constitutional provisions control in any case of conflict with lesser laws, such as statutes, local ordinances, or administrative regulations.[24] Constitutions are supreme over statutes,[25] whether territorial or state.[26] Thus, a state constitution takes precedence over a statutory scheme.[27] If there is a conflict between a statute and a state constitution, the court must determine the rights and liabilities or duties of the litigants before it in accordance with the constitution, because the constitution is the superior rule of law in that situation.[28] When a legislative instrument conflicts with a constitutional provision, the legislative instrument must fall.[29] Thus, if there is a clash between the edicts of a state constitution and a legislative enactment, the latter must yield.[30] Only the constitution is paramount to legislative enactments.[31] Neither an emergency[32] nor economic necessity[33] justifies a disregard of cardinal constitutional guarantees, nor can the common law[34] or public policy considerations override constitutional mandates.[35] It is the obvious duty of the legislature to act in subordination[36] to the state constitution with reference to the subjects upon which the constitution assumes to speak.[37]

Footnotes

1 State ex rel. Johnson v. Gale, 273 Neb. 889, 734 N.W.2d 290 (2007).

2 California Logistics, Inc. v. State of California, 161 Cal. App. 4th 242, 73 Cal. Rptr. 3d 825 (1st Dist. 2008).

[3] Renter's Realty v. Smith, 2020 WL 113382 (Ala. Civ. App. 2020); State ex rel. West Virginia Citizen Action Group v. Tomblin, 227 W. Va. 687, 715 S.E.2d 36 (2011).

[4] USA v. Pedro-Vidal, 371 F. Supp. 3d 57 (D.P.R. 2019).

[5] Nichols v. State ex. rel. Department of Public Safety, 2017 OK 20, 392 P.3d 692 (Okla. 2017).

[6] Renter's Realty v. Smith, 2020 WL 113382 (Ala. Civ. App. 2020); West Feliciana Parish Government v. State, 286 So. 3d 987 (La. 2019); In re Expunction, 497 S.W.3d 505 (Tex. App. Houston 1st Dist. 2016).

[7] Renter's Realty v. Smith, 2020 WL 113382 (Ala. Civ. App. 2020); Sherman v. Atlanta Independent School System, 293 Ga. 268, 744 S.E.2d 26, 294 Ed. Law Rep. 368 (2013); Gannon v. State, 304 Kan. 490, 372 P.3d 1181, 331 Ed. Law Rep. 1117 (2016), subsequent determination, 305 Kan. 850, 390 P.3d 461, 341 Ed. Law Rep. 446 (2017), subsequent determination, 306 Kan. 1170, 402 P.3d 513, 347 Ed. Law Rep. 1186 (2017), subsequent determination, 308 Kan. 372, 420 P.3d 477, 356 Ed. Law Rep. 443 (2018), subsequent determination, 309 Kan. 1185, 443 P.3d 294, 367 Ed. Law Rep. 1121 (2019); West Feliciana Parish Government v. State, 286 So. 3d 987 (La. 2019); MDC Restaurants, LLC v. Eighth Judicial District Court of State in and for County of Clark, 132 Nev. 774, 383 P.3d 262, 132 Nev. Adv. Op. No. 76 (2016); Ex Parte Shires, 508 S.W.3d 856 (Tex. App. Fort Worth 2016).

[8] Mays v. Snyder, 323 Mich. App. 1, 916 N.W.2d 227 (2018), appeal granted, 503 Mich. 1030, 926 N.W.2d 803 (2019).

[9] City and County of San Francisco v. Regents of University of California, 7 Cal. 5th 536, 248 Cal. Rptr. 3d 352, 442 P.3d 671, 367 Ed. Law Rep. 542 (Cal. 2019); Gannon v. State, 305 Kan. 850, 390 P.3d 461, 341 Ed. Law Rep. 446 (2017), subsequent determination, 306 Kan. 1170, 402 P.3d 513, 347 Ed. Law Rep. 1186 (2017), subsequent determination, 308 Kan. 372, 420 P.3d 477, 356 Ed. Law Rep. 443 (2018), subsequent determination, 309 Kan. 1185, 443 P.3d 294, 367 Ed. Law Rep. 1121 (2019); City of Cleveland v. State, 157 Ohio St. 3d 330, 2019-Ohio-3820, 136 N.E.3d 466 (2019); State ex rel. Workman v. Carmichael, 241 W. Va. 105, 819 S.E.2d 251 (2018), cert. denied, 140 S. Ct. 98, 205 L. Ed. 2d 24 (2019) and cert. denied, 140 S. Ct. 106, 205 L. Ed. 2d 24 (2019).

[10] Renter's Realty v. Smith, 2020 WL 113382 (Ala. Civ. App. 2020).

[11] Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018).

[12] State ex rel. Stephan v. Finney, 254 Kan. 632, 867 P.2d 1034 (1994).

[13] United Auto Workers, Local Union 1112 v. Brunner, 182 Ohio App. 3d 1, 2009-Ohio-1750, 911 N.E.2d 327 (10th Dist. Franklin County 2009).

[14] In re Pension Reform Litigation, 2015 IL 118585, 392 Ill. Dec. 1, 32 N.E.3d 1 (Ill. 2015); State ex rel. Workman v. Carmichael, 241 W. Va. 105, 819 S.E.2d 251 (2018), cert. denied, 140 S. Ct. 98, 205 L. Ed. 2d 24 (2019) and cert. denied, 140 S. Ct. 106, 205 L. Ed. 2d 24 (2019).

[15] People v. Larsen, 144 Cal. App. 2d 504, 301 P.2d 298 (2d Dist. 1956); State ex rel. Lemon v. Langlie, 45 Wash. 2d 82, 273 P.2d 464 (1954).

[16] In re Town Highway No. 20, 191 Vt. 231, 2012 VT 17, 45 A.3d 54 (2012).

[17] McLaughlin v. Jones in and for County of Pima, 243 Ariz. 29, 401 P.3d 492 (2017), cert. denied, 138 S. Ct. 1165, 200 L. Ed. 2d 314 (2018); Macon v. Costa, 437 So. 2d 806 (La. 1983); State v. LaFrance, 124 N.H. 171, 471 A.2d 340 (1983); Crowder v. Benchmark Bank, 889 S.W.2d 525 (Tex. App. Dallas 1994), writ granted, (Mar. 30, 1995) and aff'd in part, rev'd in part on other grounds, 919 S.W.2d 657 (Tex. 1996).

[18] Renter's Realty v. Smith, 2020 WL 113382 (Ala. Civ. App. 2020).

[19] Evancho v. Pine-Richland School District, 237 F. Supp. 3d 267, 345 Ed. Law Rep. 796 (W.D. Pa. 2017).

[20] Mays v. Snyder, 323 Mich. App. 1, 916 N.W.2d 227 (2018), appeal granted, 503 Mich. 1030, 926 N.W.2d 803 (2019).

[21] State ex rel. West Virginia Citizen Action Group v. Tomblin, 227 W. Va. 687, 715 S.E.2d 36 (2011).

[22] Macon v. Costa, 437 So. 2d 806 (La. 1983); Rankin v. Love, 125 Mont. 184, 232 P.2d 998 (1951); State ex rel. Lemon v. Langlie, 45 Wash. 2d 82, 273 P.2d 464 (1954).

[23] Martin v. Beer Bd. for City of Dickson, 908 S.W.2d 941 (Tenn. Ct. App. 1995).

[24] Bassett v. Newton, 658 So. 2d 398 (Ala. 1995).

[25] Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 440 P.3d 461 (2019); State ex rel. West Virginia Citizen Action Group v. Tomblin, 227 W. Va. 687, 715 S.E.2d 36 (2011).

[26] Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 440 P.3d 461 (2019).

[27] City of Fernley v. State, Dep't of Tax, 132 Nev. 32, 366 P.3d 699, 132 Nev. Adv. Op. No. 4 (2016); Nichols v. State ex. rel. Department of Public Safety, 2017 OK 20, 392 P.3d 692 (Okla. 2017).

[28] Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue, 371 N.C. 133, 814 S.E.2d 43 (2018), cert. granted, 139 S. Ct. 915, 202 L. Ed. 2d 641 (2019) and aff'd on other grounds, 139 S. Ct. 2213, 204 L. Ed. 2d 621 (2019).

[29] West Feliciana Parish Government v. State, 286 So. 3d 987 (La. 2019).

[30] Pascagoula School Dist. v. Tucker, 91 So. 3d 598, 282 Ed. Law Rep. 733 (Miss. 2012).

[31] Jones v. City of Ridgeland, 48 So. 3d 530 (Miss. 2010); Farmers Mut. Fire Ins. Co. of Salem v. New Jersey Property-Liability Ins. Guar. Association, 215 N.J. 522, 74 A.3d 860 (2013).

[32] § 62.

[33] Riley v. Carter, 1933 OK 448, 165 Okla. 262, 25 P.2d 666, 88 A.L.R. 1018 (1933).

[34] Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), as clarified, (Nov. 30, 1994).

[35] Camp v. Kenney, 673 So. 2d 436 (Ala. Civ. App. 1995).

[36] Passarelli v. Schoettler, 742 P.2d 867 (Colo. 1987).

[37] State ex rel. DuFresne v. Leslie, 100 Mont. 449, 50 P.2d 959, 101 A.L.R. 1329 (1935).

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III. Operation and Effect of Constitutions and Amendments

D. Supremacy of Constitutions; Supreme Laws

2. Supremacy of State Constitutions

§ 62. Effect of emergency on supremacy of state constitutions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 500, 502

Emergencies do not authorize the suspension of a state constitution and its guaranties.[1] Thus, no new power or authority is created by a public emergency,[2] although such a situation may disclose the existence of latent power and may call for liberal construction of constitutional powers.[3]

Many state constitutions or legislation enacted pursuant to such constitutions provide for the exercise, usually by the state's governor, of emergency powers, although some do not so provide in specific situations.[4]

Footnotes

[1] City of Mobile v. Rouse, 233 Ala. 622, 173 So. 266, 111 A.L.R. 349 (1937).

[2] State ex rel. Dept. of Development v. State Bldg. Com'n, 139 Wis. 2d 1, 406 N.W.2d 728 (1987).

[3] State ex rel. City of Columbus v. Ketterer, 127 Ohio St. 483, 189 N.E. 252 (1934).

[4] In re General Election-1985, 109 Pa. Commw. 604, 531 A.2d 836 (1987).

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IV. Construction of Constitutions

D. Construction to Determine Operative Effect

2. As Self-Executing or Not Self-Executing

b. Tests

§ 107. Constitutional provision as stating prohibition construed to be self-executing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 640

Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void.[1] However, the general principle that prohibitory provisions prevent their violation without legislation does not go beyond reasonable limits. Such provisions are not self-executing when they merely indicate principles without laying down rules by which they may be given the force of law,[2] and a nonprohibitory constitutional provision which does not merely permit but directs the legislature to implement a newly conferred right is not self-executing unless the legislative directive is purposeless because the provision is so complete with respect to the nature of the right and the means of its enforcement as to deprive the legislature of any discretion in either respect.[3]

Footnotes

[1] People v. Western Air Lines, 42 Cal. 2d 621, 268 P.2d 723 (1954).
Provisions of a constitution of a negative character are generally, if not universally, construed to be self-executing. Gray v. Virginia Secretary of Trans., 276 Va. 93, 662 S.E.2d 66 (2008).

[2] Wren v. Dixon, 40 Nev. 170, 161 P. 722 (1916).

[3] People v. Vega-Hernandez, 179 Cal. App. 3d 1084, 225 Cal. Rptr. 209 (1st Dist. 1986).

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